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Supreme Court, U.S.
FILED

No. _____ 97 1250 JAN 26 1998

IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WESLEY JOHNSTON a Minor by his Parents and Natural Guardians, Domenica Johnston and William Johnston and DOMENICA JOHNSTON AND WILLIAM JOHNSTON, on their own behalf,

Plaintiffs/Petitioners,

v.

JENNIFER GALLANT, M.D., JEREMY HEWENS, M.D., DELAWARE VALLEY FAMILY HEALTH CENTER, RUBY P. HUTTNER, M.D., and HUNTERDON MEDICAL CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE AFFIRMANCE BY THE COURT OF APPEALS FOR THE THIRD CIRCUIT OF THE FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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62PP

QUESTION PRESENTED FOR REVIEW

1. Did the trial court err in permitting the jury to pose questions on complex medical topics to physician fact- and expert-witnesses?

LIST OF PARTIES

All current parties to this appeal are listed in the caption of this matter. However, Ruth McGee, R.N. was dismissed from the case prior to trial.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REPORTS OF OTHER COURTS	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	10
CONCLUSION	16
APPENDIX	
ORDER AND OPINION OF TRIAL COURT BELOW	A-1
ORDER AND OPINION OF COURT OF APPEALS BELOW	A-14
JUROR WRITTEN QUESTIONS	A-16

TABLE OF AUTHORITIES

Cases:	Page
U.S. v. Ajmal, 67 F.3d 12 (2d.Cir. 1995)	10
U.S. v. Bush, 47 F.3d 511 (2d.Cir. 1995)	10
U.S. v. Douglas, 81 F.3d 324 (2d.Cir. 1996)	10
U.S. v. Thompson, 76 F.3d 442 (2d.Cir. 1996)	10
Rules:	
Fed.R.Civ.P. 59(a)	3
Statutes:	
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	2
28 U.S.C. §1331	2

IN THE

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REPORTS OF OTHER COURTS

No related proceeding has been before this Court previously, and Plaintiffs are aware of no other proceeding that is in anyway related, completed, pending or about to be presented to any Court, or any other agency, state or federal other than the Orders and Opinions at issue on this appeal. There are no other relevant Orders in this matter from any other Court.

STATEMENT OF JURISDICTION

The Memorandum Opinion and Order of the United States Court of Appeals for the Third Circuit was filed on October 28, 1997. The present Petition for Writ of Certiorari is timely filed pursuant to the authority of 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This is a medical malpractice case which arose from the allegedly negligent obstetrical care rendered by the Defendant Doctors Gallant, Hewens and Huttner, and Defendant Hospital, Hunterdon Medical Center, to Plaintiff Domenica Johnston during her labor and delivery with minor-Plaintiff Wesley Johnston. This case was tried to a jury commencing the first week in October 1996. After the Plaintiffs rested their case at the end of that week, trial was adjourned during the entirety of the second week in October, as well as on the following Monday, October 14, for Columbus Day. After the ten-day recess, the trial resumed on Tuesday October 15, 1996 with the beginning of the Defendants' case-in-chief. Testimony concluded on Friday October 18, 1996. Discussion on points for charge was held the beginning of the following week, and closing arguments were conducted on Wednesday October 23, 1996. The jury was charged on the morning of Thursday October 24, and began deliberating late that morning. In the early afternoon of Friday, October 25, the jury returned its verdict in favor of the Defendants.

Subject matter jurisdiction over this matter was vested in the United States District Court for the District of New Jersey by 28 U.S.C. §1331, diversity of citizenship. Specifically, Plaintiffs Domenica and William Johnston, and minor Plaintiff Wesley Johnston, at all times relevant to this action, were and are all citizens of the Commonwealth of Pennsylvania, while all of the Defendants were and are citizens of states other than Pennsylvania. Furthermore, the amount in controversy at the time in question exceeded fifty thousand dollars ($50,000), exclusive of interest and costs.

Appellate jurisdiction was vested in the United States Court of Appeals for the Third Circuit by 28 U.S.C. §1291, final decisions of district courts, as an appeal from the final order of the District Court denying Plaintiffs' Motion for a New Trial pursu-

ant to Fed.R.Civ.P. 59(a). The Order in question constitutes a final order or judgment that disposes of all claims with respect to all parties.

On the Plaintiffs' claim for negligence against Defendant Gallant, the jury returned a verdict in favor of Defendant Gallant, finding no deviation from the standard of care. On the Plaintiffs' claim for negligence against Defendant Hewens, the jury returned a verdict in favor of Defendant Hewens, finding that Defendant Hewens was negligent, but finding no proximate cause. On the Plaintiffs' claim for negligence against Defendant Huttner, the jury returned a verdict in favor of Defendant Huttner, finding no deviation from the standard of care.

Plaintiffs timely moved for a new trial, and by Order filed February 5, 1997, the Trial Court denied that motion. (A copy of the Trial Judge's Opinion is appended to this volume as Exhibit A). Thereafter, The Court of Appeals for the Third Circuit affirmed the Trial Court's ruling. (A copy of the Third Circuit's Opinion is appended to this volume as Exhibit B).

Facts of the Case

The facts relevant to the issue raised on appeal are as follows.

Plaintiffs' evidence on the standard of care was presented by Dr. James O'Leary, an expert perinatologist who was qualified as such by the Court without objection.

Dr. O'Leary described the course of Plaintiff Domenica Johnston's labor. Specifically, at 7:30 a.m. on September 25, 1991, when Plaintiffs arrived at Defendant Hunterdon Medical Center, Mrs. Johnston was noted to be in active labor, five centimeters dilated and the baby's head had descended halfway down the birth canal. Dr. O'Leary testified that, given this particular patient, with very strong and frequent contractions, he would expect that, as she reaches seven to eight centimeters of dilatation, the baby's head would come down through the pelvis and a normal rate of descent of the baby's head, one centimeter per hour, would be witnessed. However, by 8:15 a.m., as described by Dr. O'Leary, an exam of Mrs. Johnston showed that she had rapidly progressed to seven centimeters, but that no further descent

of the baby's head in the birth canal was noted. Dr. O'Leary described the rate of dilatation in Mrs. Johnston's labor as twice the normal rate.

Dr. O'Leary described the next noted exam as indicating that Mrs. Johnston had progressed to 9 centimeters of dilatation by 8:30 a.m., which constituted a rate of five to six times the normal rate of dilatation. However, by this time, the chart indicates that there has still been no further descent of the baby's head in the pelvis.

The next exam noted occurred at 8:45 a.m., and at that time Mrs. Johnston was noted to be fully dilated, at 10 centimeters; however, the chart indicates that the baby's head has still progressed no further in the birth canal.

Dr. O'Leary testified that the standard of care at 8:45, when Defendants Hewens and Gallant were on the scene and sharing responsibility, required a diagnosis of arrest of descent, and consultation with an obstetrician, while giving an additional hour of labor to confirm the diagnosis of arrest of descent.

At 8:45 a.m., Mrs. Johnston was instructed to begin pushing with her contractions. Given the absence of any further descent by 9:15 with this pushing, according to Dr. O'Leary, it should become apparent that the baby's head is too big for the pelvis. Given the absence of any notation of descent of the baby's head, the standard of care at 9:45, when Defendants Hewens and Gallant were still co-managing the labor, required a definitive diagnosis of arrest of descent, consultation with an obstetrician if one had not yet been obtained, and decision to perform a cesarean section.

Dr. O'Leary explained that the indication in Mrs. Johnston's case was that a condition known as cephalopelvic disproportion (CPD) was present, meaning that there is a difference between the size and shape of the baby's head and/or the size and shape of the mother's pelvis, and the critical degree of CPD in Mrs. Johnston's case necessitated a cesarean section. If a cesarean section is not performed in such a case, according to Dr. O'Leary, the baby's head will continue to be pressed against the pelvis during each one-minute-long contraction, which were occurring every two minutes. You would also see swelling of the baby's head, find that the baby's head becomes wedged in the pelvis, and

experience "molding", or a changing of the shape of the bones in the baby's head, which gives the appearance of the baby descending.

From the time that Mrs. Johnston was admitted to Defendant Hunterdon Medical Center on the morning in question, her labor and delivery was managed by Defendant Gallant, who at the time was not an obstetrician, but a third year resident in family practice. Shortly after her arrival, Defendant Hewens arrived to participate in the management of the labor and delivery. Defendant Hewens was not an obstetrician, but an attending physician in family practice. It was not until approximately 11:00 that an obstetrician became involved in managing Mrs. Johnston's labor and delivery.

Dr. O'Leary's criticism of Defendant Huttner was that he deviated the standard of care at 11:00, when he came on the scene. The standard of care at that time required Defendant Huttner to recognize this same arrest of descent referred to above, and perform an immediate cesarean section. This opinion was based upon Dr. O'Leary's review of Defendant Huttner's own note of that exam, which indicated: that he was unable to rotate the baby's head in the pelvis even a little bit, indicating that it was wedged; that the baby's head had a moderate amount of molding; and that the fetal scalp advanced to +1/+2 station within the birth canal when Mrs. Johnston pushed, another sign of molding and wedging.

However, rather than perform an immediate cesarean section, Defendant Huttner directed that a vacuum extractor be applied to the baby's head to attempt to pull him out. After three attempts at vacuum delivery were unsuccessful, in which the baby's head failed to move with any of the three pulls, the baby was ultimately delivered via cesarean section at approximately 11:47 a.m.

On causation, Plaintiff's presented the testimony of expert neonatologist Gilbert Pereira. Dr. Pereira is a neonatologist at the Children's Hospital of Philadelphia, and was qualified as an expert by the trial court without objection from the Defendants.

Dr. Pereira reviewed the medical records of Plaintiff Domenica Johnston from her delivery, as well as the medical records of Plaintiff-infant Wesley Johnston from both the Defen-

dant Hunterdon Hospital as well as the Children's Hospital of Philadelphia. Dr. Pereira testified that Wesley Johnston suffered a thrombosis, or blood clot, of the middle cerebral artery. This clot prevented the area of the brain which is supplied by that artery from receiving the blood supply, and as a result the brain tissue in that area is damaged. This end result of damaged brain tissue is called an "infarction".

This much of the chain of causation is essentially uncontested by the Defendants. The critical, and only, question on the issue of causation was the cause, or "etiology", of the clot or blockage.

On this, Dr. Pereira explained:

> My opinion is that formation of the clot, the blood clot in these major arteries of the brain, was a result of a combination of two factors. The first factor was the fact, was the lack of oxygen that Wesley suffered before birth. When there is not enough oxygen getting to the fetus, as is common during the process of delivery, there is a buildup of acid in the blood and this buildup of acid can damage the inner surface of the blood vessel called the [of the vessel].
>
> And with that as the background and having some trauma to the head and causing stretching of these blood vessels as a result of the application of the vacuum extractor that in his case was used three times, that led to the formation of these blood clots.

For evidence of the lack of oxygen in this case, Dr. Pereira pointed to the episodes of fetal heart decelerations during delivery that were noted by the nurses notes in the mother's record during the time of delivery. Dr. Pereira also pointed to the cord blood pH reading of 7.183, testifying that a pH of less than 7.2 is the point at which the acid which will damage the blood vessel walls starts to build up. Dr. Pereira also pointed to the minor compromise of other organs of Wesley Johnston, including his kidneys and liver.

Dr. Pereira testified that these signs were each, in and of themselves, minor, but when taken together, they are evidence of sufficient decrease in oxygenation to cause this buildup of acid which compromises the blood vessel walls.

As evidence of trauma caused by the vacuum extractor, Dr. Pereira pointed to the physical examination done in the nursery, which revealed swelling of the scalp in the area of the vacuum, and was a sign of local trauma.

It was the pressure created by application of the vacuum three times against a skull that did not move which worked upon the blood vessels which were compromised by the buildup of acid discussed above.

Dr. Pereira supported his theory of causation by showing that the work-up done at Children's Hospital ruled out other possible causes of the artery blockage, including any coagulation problem and infection.

Dr. Pereira concluded that:

> If the C-section had been performed before the application of the vacuum extractor three times, that would be a prevention of the trauma that allowed the formation of the clot to take place. So I think if that was prevented, the clot — the formation of the clot would have been prevented as well.

Dr. Pereira testified that the association between the decrease in oxygen combined with trauma leading to this type of blockage is very well documented in the literature.

Finally, Dr. Pereira testified that the timing of the first seizure experienced by Wesley Johnston, which occurred at approximately 24 hours of life, is consistent with the initial injury occurring during the labor and delivery.

Dr. Ronald Jacobson, a pediatric neurologist, also testified for Plaintiffs on the issue of causation. Dr. Jacobson was qualified as an expert without objection.

As with Dr. Pereira, Dr. Jacobson also reviewed the clinical records for Wesley and Domenica Johnston, as well as the radiographic studies conducted upon Wesley Johnston. Dr. Jacobson testified that one cannot simply look at the radiographic studies, but must examine the clinical information, which puts everything in context.

Dr. Jacobson concluded that Wesley suffered events during labor which led to the damage to his brain tissue.

Dr. Jacobson corroborated Dr. Pereira's theory of causation, by pointing out that this was <u>not</u> a case where asphyxia, or lack of

oxygen alone, caused the brain damage. He testified that the presence of the "strokes", or infarctions are "area[s] where the blood vessels were blocked from probably a blood clot which either traveled there or arose there or perhaps a combination of both, and that resulted in more specific ways to understanding the symptoms".

In reviewing the CAT Scan film from Children's Hospital, which was taken at approximately 36 hours of life, Dr. Jacobson testified that this is consistent with a fresh injury which occurred during the labor and delivery period.

Finally, Judy Bernbaum, M.D. testified on behalf of the Plaintiffs. Dr. Bernbaum is a pediatrician at Children's Hospital of Philadelphia, who works within the neonatology, or newborn medicine, department. Specifically, Dr. Bernbaum is the director of the Neonatal Follow-up Program, which closely follows children cared for in the newborn intensive care unit who are at risk for subsequent neurologic or developmental problems. In that capacity, Dr. Bernbaum has acted as a treating physician for minor-Plaintiff Wesley Johnston. Dr. Bernbaum was offered, without objection, as an expert in the field of pediatrics, and particularly in evaluating a child as part of the specialty of neonatal follow-up. After outlining at length Wesley Johnston's care at the Neonatal Follow-up Program, Dr. Bernbaum testified that he suffers from cerebral palsy. Dr. Bernbaum also testified that there is a direct correlation between the cerebral insults, the cerebral infarction that Wesley Johnston sustained, and his neuromotor abnormalities as exhibited in his care at the Program.

The only expert presented by the Defendants on the issue of causation was Dr. Robert Zimmerman, a neuroradiologist. Dr. Zimmerman agreed that Wesley Johnston suffered a cut-off in the blood supply to the middle cerebral artery, which results in an "infarct". Dr. Zimmerman agreed with Drs. Pereira and Jacobson that something became lodged in the vessel and cut off the blood supply.

Dr. Zimmerman concluded that the blockages in the artery were caused by something that traveled through the artery and lodged. Dr. Zimmerman describes this as an "emboli", however,

he admitted that there is often no difference between an "emboli", and a "thrombus" as described by Drs. Pereira and Jacobson:

> In essence, one of the common emboli that we as adults and children have and infants have is a thrombus, and that thrombus can form . . . and it can . . . be set loose if this was a thrombus . . . it gets into the blood flow and it goes sailing and it goes with the blood flow.
>
> • • •
>
> If you have a thrombus that is acting as an embolus, a thrombus is a piece of clot, then it breaks off and goes sailing off to your brain and it produces what you see here, which is infarction.

Therefore, a blood clot is called a "thrombus" if is remains stationary, but if it travels in the blood vessels and gets lodged farther down the line, it is called an "embolus". All of the experts on causation agree to this.

Ultimately, Dr. Zimmerman had no opinion as to the source of the "emboli" which caused the blockage of the artery in this case.

The only other testimony on causation was presented through the ostensibly "fact" witness, Dr. Robert Clancy, who treated Wesley Johnston at the Children's Hospital of Philadelphia when he was transferred there from Hunterdon Hospital.[1]

Dr. Clancy agreed that Wesley Johnston's strokes, or infarctions, were caused by "so called emboli" which could be a traveling blood clot. In fact, Dr. Clancy later confirmed that Wesley blockages were in fact "blood clots".

However, as with Dr. Zimmerman, Dr. Clancy testified that, with respect to this blood clot, "I don't know where it formed from, but something had formed and had blocked those blood vessels".

As set forth below, due to the complex nature of both causation and standard of care issues in this case, the manner in which juror questions were permitted deprived Plaintiffs of a fair and impartial jury deliberation.

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1. Dr. Clancey's testimony was admitted over Plaintiff's objections.

ARGUMENT

The issue of permitting jurors to put questions to witnesses has never been directly addressed by the Third Circuit. Other Courts of Appeal which have addressed the issue have found the practice to be within the discretion of the trial court, but have voiced serious concerns and put limitations on the practice.

Most remarkably, the Second Circuit has engaged in an extended analysis of this issue in a recent line of criminal cases. See: United States v. Thompson, 76 F.3d 442 (2nd Cir. 1996); *United States v. Bush*, 47 F.3d 511 (2nd Cir. 1995); *United States v. Ajmal*, 67 F.3d 12 (2nd Cir. 1995); and *United States v. Douglas*, 81 F.3d 324 (2nd Cir. 1996). The cautions raised by the Second Circuit in this line of cases apply to a complex civil medical malpractice case such as the case at bar, and weigh against the manner in which the trial court exercised its discretion in this regard.

The Second Circuit has identified the risks that jury questioning entails:

> Among them are the possibilities that a juror might abandon the role of neutral decision-maker and pose questions as an advocate, might pose questions based on premature evaluation of the evidence, might be distracted from comprehending new testimony by preparing questions on prior testimony, or might inject prejudice by displaying skepticism.

Douglas, supra, 81 F.3d at 326.

The Second Circuit in *Douglas, supra*, stated that, while it has held that a trial judge has the discretion to allow questioning by jurors, "we have also made clear that the risks of adverse consequences make it inappropriate for a trial judge to invite or encourage such questioning. . . . Doing so risks an undue extent of questioning and might even cause some jurors to feel that they are not fulfilling their responsibilities unless they ask questions." *Id.* (citations omitted).

Plaintiffs do not presently challenge the trial court's discretion in **permitting** juror questions in general. However, based upon the rationale of the Second Circuit, the **invitation** to for-

mulate such questions was prejudicial to the Plaintiffs. Further, the **manner** in which the questions were put was prejudicial to the Plaintiffs.

The written questions submitted by the jury went beyond the mere request for clarification or repetition of prior testimony. Rather, these questions addressed areas of expert opinion testimony on subjects not previously addressed by the witnesses, nor discussed in pre-trial expert discovery.

The content of these questions indicates that the jury went beyond its role of a mere judge of the testimony presented in court, and assumed the role of an advocate by introducing new theories and concepts not raised by the parties in court.

The jury submitted a total of 21 pages of questions, which contained a total of 55 questions. (A copy of the questions submitted by the jurors is appended to this volume as Exhibit C). As the filing dates of these juror questions indicate, 44 of these questions were submitted during the defense case-in-chief, after the Plaintiffs had rested and after their experts had left the courtroom and the State. This was also after the ten-day recess in the trial.

The harms of this practice are several. Initially, the manner in which many of the juror questions were put to witnesses was through attorney questioning of a witness, without the question being identified as that of a juror. As such, only one juror out of the ten knew that the question was a juror question, and not a question intended by any of the attorneys as important to their case. The other nine jurors were left to believe that this was relevant, crucial information which was elicited upon the intention of the attorney in furtherance of their case. In fact, many of the questions raised by the jury, while undoubtedly the product of well-justified curiosity in this complex case, especially with the invitation to formulate such questions, dealt with areas that were not in issue, and therefore could only mislead and confuse the jury, such as:

"What are some of the known causes of cerebral palsy? I don't believe this has been mentioned."

Indeed this question was irrelevant for, as set forth above, it was uncontested that Wesley Johnston's cerebral palsy was caused by infarctions, or areas of dead brain tissue.

"What if any other tests were done prenatally either by Dr. Gallant or Dr. Hewens? - to determine any possible problem or defects?

Will we hear Mr. and Mrs. Johnston's family medical history?"

These questions were irrelevant as neither pre-natal care nor the Johnston's medical history were implicated in the injuries suffered by minor Plaintiff Wesley Johnston.

"Give the argument by the plaintiff for CPD . . . can the size of the baby's head and the size of the pelvis be measured to conclusively prove CPD? If yes, was that done w/Mia & Wesley & what was the result? If not, why weren't the measurements done?"

"If a mother's heart rate goes up with activity or stress will a fetus' heart rate go up also in relationship to the mother.

What are the possible effects of several episodes of prolonged bardycardia?

What is the earliest station you can see the baby's scalp?

How quickly can the pH or 02 level or Bicarb level change?

Was Mrs. Johnston given any medication besides oxygen during labor?

"How serious and what type if any, damage can be done by 3 episodes of a lower heart rate (as 90 to 95 bpm) for periods of 2 to 4 minutes continuous. Are decelerations of this nature, really considered unalarming? Other than embilical (sic) cord considerations and contractions, what are causes of these decelerations?"

"What does it mean if the baby is lodged in the birth canal when a C-section is being done? Is this a truly negative condition for the baby to be in? In terms of Baby Wesley, what are the implications?"

"Could an emboli have originated in the umbilical cord?"

"Can you have a normal heart rate and be acidotic?"

Is it possible to have a normal heart rate immediately after a stroke?

If a mother is receiving oxygen during labor, delivery, or a C-section would the fetus benefit from it also?"

"Can normal pH levels still be maintained if asphyxia occurred?

"What causes the lack of filling of the branches of the anterior serval (sic) artery, and or the middle serval (sic) arteries? Is it possible to occlude blood flow to the middle serval (sic) arteries in the brain by applying enough pressure to scalp or skull? Is it possible for encephalo-disproportion (sic) to have caused these occlusions?"

The second sentence of this last question indicates that this juror was confused by the defenses refutation of a theory which Plaintiffs never propounded, as explained above.

The second problem with the manner of admission of juror questions was that nearly all of them were allowed to be put to defense witnesses and experts. As these were questions beyond mere clarification, and raised areas of new opinions, they were put to defense witnesses whose responses Plaintiffs did not have prior. They were put to defense witnesses, who gave answers with a pro-defense spin, and without the ability of Plaintiffs' to challenge them based upon expert testimony of their own. They also permitted the defense experts to assert their case again, without nine of the ten jurors knowing that the only reason the question was being asked was at the behest of a single juror. And they put Plaintiffs in the position of either allowing the question, or upon objection having defense counsel state that it was only being asked at a juror's behest, which places Plaintiffs' counsel in the appearance of an adversarial stance with the jury for objecting to the question.

Finally, the questions were put to witnesses who were not qualified to answer them, but were merely the most "convenient" witness, as they were on the stand at the time. For instance, in placing one juror question to defense expert obstetrician Quartell, counsel for defense counsel prefaced with "I don't know, in light of your testimony on direct, if you have the qualifications to answer this next question and don't feel because I'm asking it you necessarily have to be qualified." That question involved the complex area of the rate of change of pH, O2 levels and bicarbonate levels quoted above. The same preface was placed before another

juror question which was put to defense expert Dr. Quartell, and this time the trial court made the same remark:

> MR. POMEROY: And if you feel the question is beyond your expertise to answer, tell me that. That's an acceptable answer.
>
> THE COURT: Yes, it is an acceptable answer and in this case this was not a question prepared by the attorney. But we are trying to resolve any questions that may be asked by the jurors. So it is perfectly appropriate and proper, and you are encouraged to say if that's not your specialty or if that's not something that you in your specialty as an obstetrician-gynecologist would appropriately answer, or something you would be coming in contact with, just tell us and that s a perfectly acceptable answer.

Dr. Quartell went on to answer the question, although it involved the neurologic area of strokes and their indication. This is an area that Dr. Quartell, as an obstetrician who does not treat children with strokes (which is the area of a neonatologist and neurologist) is not qualified to answer. It is respectfully submitted that it is not for an expert witness to dictate what areas and what questions are within his qualifications. Rather, it is for the court, based upon the *voir dire* on qualifications, to determine whether the witness is qualified as an expert, and if so, in what areas he is qualified. The practice of inviting an expert, who is advocating a particular side, to self-qualify himself in an area outside of his practice, is prejudicial to the Plaintiff, who must suffer his answer and be unable to challenge it without opening up an entirely knew area of the case on which discovery of that particular witness had not been conducted.

Finally, several of the jurors came to the trial with a background in medicine, and several of the jury questions evinced an application of this outside knowledge to this case. Specifically, questions raised by a juror about accreditation of the hospital and doctors by the Joint Committee for the Accreditation of Hospital (J.C.A.H.) evince this application of out-of-court medical information. The J.C.A.H. had never been mentioned by anyone during the course of the trial prior to that question. Significantly, it was not raised by counsel for the hospital himself. As such, it raises serious concerns of whether one or more jurors brought

their own specialized medical knowledge to the trial and to the deliberations. The application of such specialized knowledge is just as improper and prejudicial as if a juror takes it upon themselves to conduct an independent investigation. In essence, they are investigating their own store of medical knowledge.

Jurors are to bring to the courtroom their own knowledge of common sense and their ability to judge witnesses' credibility. They are not to bring their own knowledge of medicine and weigh the in-court witnesses' testimony against that knowledge.

It is apparent from the questions submitted that, at the trial court's invitation, the jury went beyond raising questions such as "what did the witness mean when he said . . ." and instead they formulated questions on complex areas not even raised by any party during the trial.

In a complex case such as this, involving obstetrics, neonatology, perinatology, pediatrics, and pediatric neurology, literally years could be spent covering every area of these subjects. However the proper role of the trial and the trial attorney is to narrow the issues and present only the evidence which is relevant to the narrow issues being tried. In a simple slip-and-fall case or automobile accident, the other jurors may very well be able to recognize for themselves the significance, or lack thereof, of a fact raised by another juror's question. However, in a complex case such as this, the other jurors are left to wonder exactly how that fact fits in to the picture being put together by the attorneys. And when the juror questions are raised during the defense case, to a defense witness who can color the answer however he or she wishes to support their position, and when the Plaintiffs are not in a practical position to counter that testimony, as was the case in this trial, the Plaintiffs are greatly prejudiced.

For these reasons it is respectfully submitted that the Trial Court abused its discretion in the manner of its invitation to the jurors to formulate questions and manner of having those questions put to the witnesses. To permit jurors to pose questions in the manner that occurred in this complex medical malpractice case deprived the Plaintiffs of their right to a fair and impartial jury, because it converted that jury, perhaps unwittingly, into

advocates for positions that were neither raised by the parties nor were relevant to the case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

By:_____

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WESLEY JOHNSTON, A Minor by his parents and natural guardians, DOMENICA JOHNSTON, and DOMENICA JOHNSTON and WILLIAM JOHNSTON, on their own behalf	)	
v.	)	JUDGMENT IN A CIVIL CASE
	)	CIVIL NO. 93-3281(AET)
JENNIFER GALLANT, M.D., JEREMY HEWENS, M.D., DELAWARE VALLEY FAMILY HEALTH CENTER, RUBY P. HUTTNER, MD., with HUNTERDON MEDICAL CENTER,	)	

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendants, Jennifer Gallant, M.D., Jeremy Hewens, M.D., Delaware Valley Family Health Center, Ruby P. Huttner, M.D. and Hunterdon Medical Center, and against the plaintiffs, Wesley Johnston, a Minor by his parents and natural guardians, Domenica Johnston and William Johnston, and Domenica Johnston and William Johnston, on their own behalf for no cause of action.

Ordered this case dismissed.

DATE: 10/27/96 /s/ Anne E. Thompson
HON. ANNE E. THOMPSON,
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WESLEY JOHNSTON, et al.,	:	
	:	
Plaintiff,	:	Civil No. 93-3281 (AET)
	:	
v.	:	ORDER
	:	
JENNIFER GALLANT, et al.,	:	
	:	
Defendant.	:	

For the reasons set forth on the record on this date;

It is on this 3rd day of February, 1997;

ORDERED that plaintiffs' motion for a new trial be and hereby is **denied.**

/s/ Anne E. Thompson

ANNE E. THOMPSON,
CHIEF JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WESLEY JOHNSTON, et al.,	:	
Plaintiff,	:	Civil No. 93-3281 (AET)
v.	:	ORDER
JENNIFER GALLANT, et al.,	:	
Defendant.	:	

THOMPSON, Chief Judge

This matter is before the Court on motion by plaintiffs for a new trial pursuant to FED. R. Civ. P.59 (a). For the following reasons, plaintiffs' motion is denied.

1. BACKGROUND

Plaintiffs filed this action on July 19, 1993, against Dr. Jennifer Gallant, Dr. Jeremy Hewens, Dr. Ruby, Huttner, the Delaware Valley Family Health Center, Nurse Ruth McGee and the Hunterdon Medical Center ("HMC"). At the time of trial, claims remained against Drs. Gallant, Hewens, and Huttner and the Hunterdon Medical Center. Plaintiffs alleged that defendants' negligence caused permanent brain injury to infant-plaintiff Wesley Johnston. This medical malpractice case was tried to a jury throughout the month of October, 1996. On October 25, 1996, the jury returned a verdict in favor of Dr. Gallant, Dr. Huttner and Hunterdon Medical Center. The jury also returned a verdict in favor of Dr. Hewens; although the jury found that Dr. Hewens was negligent, it found that Dr. Hewens' negligence was not the proximate cause of Wesley Johnston's injuries.

II DISCUSSION

Under Fed.R. Civ . P. 59 (a), a court may grant a new trial on all or part of the issues presented at trial if the court determines that the verdict is against the weight of the evidence. The

decision to grant a new trial lies within the court's discretion. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980); American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943, 948 (3rd Cir. 1984), *cert. denied*, 469 U.S. 854 (1984). However, a district court should only grant a new trial where "a miscarriage of justice would result if the verdict were to stand." Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 211 (3d Cir. 1992) (citing Williamson v. Consolidated Rail Corp., 926 f.2d 1344, 1352 (3rd Cir. 1991). In Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940), the Supreme Court held:

> The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

In considering a motion for a new trial under Rule 59, the district court should "not substitute its 'judgment of the facts and the credibility of the witnesses for that of the jury.'" Fineman, 980 F.2d at 211 (citing Lind v. Schenley Indus. Inc., 278 f.2d 79, 90 (3d Cir. 1960)). It is , however, appropriate for the judge to weigh the evidence and grant a new trial where the Judge has a definite and firm belief that a mistake has occurred. 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D §2806 at 75; *see also* Kerry, Coal Co. v. United Mine Workers of America, 488 F. Supp. 1080 (W.D.Pa. 1980).

Plaintiffs presently move for a new trial on the grounds that the jury verdict was against the weight of the evidence and that legal errors by the Court affected the verdict. Due to the complexity of this case, we will address each issue separately.

A. Jury Verdict

Plaintiffs first argue that the jury verdict is against the weight of the evidence on the issues of causation and negligence. In terms of causation, plaintiffs allege that the jury, in view of the testimony provided by plaintiffs' experts, was incorrect in finding that Dr. Hewens did not proximately cause Wesley Johnston's

injuries. Plaintiffs maintain that their expert witnesses, Drs. Pereira and Jacobson, explained the plaintiffs' theory on causation: a combination of a decrease in oxygenation and vacuum attempts caused a blood clot to form which led to a blockage in Wesley Johnston's middle cerebral artery. Plaintiffs argue that defendants' expert witnesses, Drs. Zimmerman and Clancy, did not rebut this causation theory at trial. On the issue of negligence, plaintiffs assert that the jury verdict in favor of Drs. Gallant and Huttner is erroneous and contrary to the weight of the evidence offered by their expert, Dr. O'Leary. Along these lines, plaintiffs charge that Dr. O'Leary testified that all three doctors deviated from the standard of care and that, as the "averments of negligence against all three Defendants were essential[ly] identical." a finding of negligence as to one doctor requires a finding of negligence against all three doctors.

In opposition, defendants argue that the jury verdict is entirely consistent with the evidence presented during trial. Defendants argue that the testimony of Dr. Pereira was refuted by the defense medical experts, Drs. Zimmerman, Clancy, Morgan and Quartell. Defendants contend that their experts testified during trial that Wesley Johnston's brain damage was not associated with perinatal asphyxia or attempts at vacuum delivery. Furthermore, defendants urge that the jury finding that Dr. Hewens acted negligently but did not proximately cause Wesley Johnston's injuries is consistent with the finding of no cause for Drs. Gallant and Huttner; defendants argue that the jury may have reasonably agreed with some, but not all, of Dr. O'Leary's testimony regarding deviation from the standard of care.

In the present case, we find no reason to overturn the verdict on either causation or negligence. After considering the evidence presented by plaintiffs and defendants at trial, we find that the verdict was not against the weight of the evidence. The trial was both complicated and lengthy and involved the presentation of an extensive amount of medical information to the jury. Both plaintiffs and defendants introduced expert testimony to support varying theories as to the cause of Wesley Johnston's injuries. The testimony set forth by the plaintiffs' expert on causation, Dr. Pereira, was called into question on two accounts: the extensive cross-examination of Dr. Pereira by defendants' attorneys and the

testimony of defense experts who rejected plaintiffs' theory that asphyxia plus vacuum attempts caused Wesley Johnston's injuries. This Court had the opportunity to observe all of the witnesses at trial; taking the evidence into account, we find that it was reasonable for the jury to determine that plaintiffs failed to demonstrate that Dr. Hewens or the other defendants caused Wesley Johnston's injuries.

We disagree with plaintiffs contention that the jury's finding of negligence as to Dr. Hewens required a finding of negligence as to all three doctors. A determination of negligence as to one doctor did not depend upon a finding by the jury that arrest of descent had occurred and, consequently, that all three doctors were negligent. While we decline to list potential explanations for the jury finding of negligence as to only Dr. Hewens, we note that during trial plaintiffs offered different theories of liability as to each doctor and the role of each defendant doctor during delivery was sufficiently separate to permit independent findings as to negligence. The standard of care required of each doctor differed depending on his or her level of expertise. Accordingly, the jury charge explained the specific standard of care owed to a patient by defendant Dr. Gallant, a resident, defendant Dr. Hewens, an attending physician, and defendant Dr. Huttner, an obstetrician. As plaintiffs have failed to convince the Court that the verdict was contrary to the weight of the evidence, plaintiffs' motion is denied on this ground.

B. Errors of Law

The second argument made by plaintiffs in support of their motion for a new trial is that legal errors during trial affected the jury verdict and prejudiced the plaintiffs. The plaintiffs charge that the Court made four legal errors: (1) permitting juror questions during trial, (2) admitting evidence that Hunterdon Medical Center received accreditation by the Joint Commission on the Accreditation of Hospitals ("J.C.A.H."), (3) limiting cross-examination of defendant doctors with medical texts, and (4) allowing the testimony of a treating physician, Dr. Clancy. We will deal with each of plaintiffs allegations separately.

1. Juror Questions

Plaintiffs state that the Court erred in admitting juror questions at trial. Plaintiffs acknowledge that this issue has not been addressed by the Third Circuit and that a number of circuit courts have found juror questions to be within the discretion of the trial judge. Quoting from United States v. Douglas, 81 F.3d 324 (3rd Cir. 1996), plaintiffs argue that "the risks of adverse consequences make it inappropriate for a trial judge to invite or encourage such questioning." Douglas, 81 F.3d at 326; Plaintiffs' Brief at 18. Plaintiffs presently argue that the Court "invited" jurors to ask questions during trial. Furthermore, plaintiffs contend that a number of juror questions went beyond clarification or repetition of testimony and dealt with areas of medicine at issue. As the defense attorneys posed juror questions to their experts while on the stand, plaintiffs argue that the answers favored the defense. Furthermore, plaintiffs argue that the defense experts who answered juror questions were not qualified as expert witnesses in the areas of medicine dealt with in the juror questions.

In opposition, defendants argue that the parties were told at the outset of trial that jurors would be permitted to take notes and submit written questions to the Court and that plaintiffs raised no objection. Defendants state that counsel for the plaintiffs did not object to juror questions until almost the end of trial. Defendants also argue that the jury asked thoughtful, unbiased questions. Finally, defendants note that juror questions were written down and handed to the Judge, who gave them to the attorneys, who then decided whether or not to ask the questions of witnesses on the stand.

While the Third Circuit has not yet addressed this issue, a number of other courts have held that it is within the discretion of the trial judge to permit juror questions. *See* DiBenedeto v. Goodyear Tire & Rubber Company, 754 F.2d 512, 515 (1985); United States v. Sutton, 970 F.2d 1001 (1st Cir. 1992); United States v. Bush, 47 F.3d 511 (2d Cir. 1995) United States v. Callahan, 588 F.2d 1078 (5th Cir.), *cert. denied*, 444 U.S, 826 (1979); *accord* United States v. Lewin, 900 F.2d 145, 147 (8th cir. 1990). UNDER FED. R. EVID. 611(a), a court may "exercise reasonable control over the mode and order of interrogating witnesses."

FED. R. EVID. 611(a); DeBenedetto, 754F.2d at 515. There are acknowledged risks attendant to the practice of permitting juror questions and it is important that a court institute safeguards to protect against bias. Sutton, 970 F.2d at 1005. As a general rule, a court should only allow juror questions when "compelling circumstances" warrant deviation from standard practice. DeBenedetto, 754 F.2d 515. Juror questions may be utilized in complex cases, provided that the court implements procedures to safeguard against prejudice. Sutton, 970 F.2d at 1005, 1006; *see generally* Sand & Reiss, a Report on Seven Experiments Conducted by District Court Judges in the Second Circuit, N.Y.U.L. Rev. 423,444 (1985).

Here, we find that permiting jurors to write questions during trial did not prejudice either party. At the outset of trial, the Court stated that jurors would be permitted to take notes and submit written questions to assist with their deliberations in this complicated medical malpractice case. There were no objections raised and the Court established a procedure whereby written juror questions were given to the Judge, who reviewed the questions and had copies made for the attorneys. The attorneys were left to decide whether to pose joror questions to witnesses and jurors were not personally permitted to question witnesses during trial. In total, there were approximately 19 juror submissions to the Court, a number of which included multiple questions. The juror questions generally focused on the intricacies of Mrs. Johnston's delivery and the potential causes of Wesley Johnston's injuries. Although numerous questions were submitted, only a few were asked of witnesses on the stand. Neither plaintiffs nor defendants objected to any of the questions when they were initially presented to the attorneys. Plaintiffs did not object until nearly the close of trial, when one of the defense attorneys asked a juror question to a defense expert. Plaintiffs argue that asking a juror question to a defense expert created a pro- defense spin, however, plaintiffs were free to either ask juror questions to their witnesses or to cross examine the defense witnesses.

We find that the Court instituted sufficient procedures to safeguard against prejudice to either party. This case involved

particularly complex issues and held enormous potential for jury confusion; as such, the risks surrounding juror questions were significantly outweighed by the potential benefits. At the beginning of trial, the Court informed plaintiffs and defendants that jurors would be permitted to ask questions; neither party objected to this practice. Jurors were informed that it was within the discretion of the attorneys to ask juror questions to witnesses and that many questions might not be asked of witnesses. An unbiased and effective procedure for facilitation of juror questions was established by asking jurors to write questions out and submit them to the Court for review. As we conclude that no biased juror questions were posed to witnesses and find that there was no prejudice to either party, we will deny plaintiffs' motion for a new trial on this ground.

2. J.C.A.H. Accreditation

Plaintiff's further argue that the Court erred as a matter of law by allowing into evidence the J.C.A.H. accreditation of Hunterdon Medical Center. Plaintiffs allege that testimony by a hospital employee that Hunterdon Medical Center was accredited by J.C.A H. constituted inadmissable hearsay. Plaintiffs also contend that no official accreditation papers were submitted into evidence. Finally, plaintiffs charge that defendant Hunterdon Medical Center never proved that the J.C.A.H. accreditation demonstrated its compliance with the standard of care.

In opposition, defendants argue that the Court did not err in permitting testimony on Hunterdon's accreditation by J.C.A.H. Defendant Hunterdon contends that it called Pat Steingall, a registered nurse employed by Hunterdon as the nurse manager of the maternity care unit, to rebut Dr. O'Leary's claim that the hospital policy should have specifically required an obstetrical consultation whenever "arrest of descent" was diagnosed, During her testimony, Nurse Steingall stated that the hospital policy was approved by J.C.A.H.[1] Finally, defendant Hunterdon argues that the Court specifically instructed the jury that the J.C.A.H. accreditation was only one factor for consideration and not dispositive as to compliance with the standard of care.

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1. In her April 1996 affidavit, nurse Steingall said that the hospital policy was approved by J.C.A.H.

In the present case, we find that the J.C.A.H. accreditation of Hunterdon Medical Center was admissible at trial. As an initial matter, plaintiffs did not challenge the existence of the J.C.A.H. accreditation at trial. Plaintiffs contend that Nurse Steingall's testimony regarding the hospital's J.C.A.H. accreditation constituted inadmissable hearsay.

We disagree. Plaintiffs have failed to demonstrate that evidence of Hunterdon Medical Center's J.C.A.H. accreditation constitutes an out of court statement offered for its truth. While both statements and documents are covered by the hearsay rules, defendants did not introduce documentation of the accreditation at trial and the only statement given was Nurse Steingall's in court statement based on her personal knowledge of the accreditation. Plaintiff's did not challenge the existence of the J.C.A.H. accreditation at trial and did not argue issues of authenticity or best evidence.

As a final matter, plaintiffs seek to interview any jurors with a background in medicine to determine whether the information on J.C.A.H. affected the verdict in favor of Hunterdon Medical Center. The attorneys all knew there was a nurse with hospital experience on the jury. The Court will deny plaintiffs request to interview jurors; plaintiffs have failed to offer any specific evidence in favor of their claim that jurors with medical knowledge were unfairly swayed by the admission of testimony regarding the J.C.A.H. accreditation of the Hunterdon Medical Center

3. Cross-examination with Medical Texts

The plaintiffts contend that the Court erred in limiting the cross-examination of the defendant doctors with medical texts.[2] Essentially, plaintiffs argue that the defendant doctors gave expert testimony during trial and, therefore, plaintiffs should have been permitted to cross-examine the defendants doctors with medical texts.

A specific hearsay exception exists for the admission of learned treatises which are called to the attention of an expert

2. Plaintiffs did not disclose in answer to defendants' interrogatory that they intended to cross-examine the defendant doctors with learned treatises. Plaintiffs subsequently attempted to introduce learned texts to rebut the testimony of Drs. Gallant and Hewens and presently argue that they had not initially anticipated the scope of the defendants' testimony.

witness upon cross-examination or relied upon by the expert during direct testimony. FED.R. EVID. 803(18). The New Jersey Supreme Court has adopted the federal rule of evidence governing learned texts. Jacober v. St. Peter's Medical Center, 128 N.J. 475 (1992). In Jacober, a medical malpractice case, the issue before the Supreme Court was whether medical experts and a defendant doctor had to acknowledge learned treatises as authoritative before the texts were admissible. In ruling that learned texts could be qualified as authoritative by expert testimony or judicial notice, the Supreme Court held that learned treatises may be introduced as substantive evidence on either direct or cross-examination.

When a defendant doctor testifies as a fact witness and not as an expert medical witness, a judge is not obligated to allow cross-examination with medical texts. The judge must determine whether, in view of the testimony given, the defendant doctor has testified beyond the scope of the factual circumstances and effectively given his or her opinion as an expert witness. In making this determination, there is no bright line rule; the factual testimony of a defendant doctor may necessarily include some medical information which the doctor relied upon in determining a course of treatment.

While we recognize that there is a fine line between testimony by a defendant doctor as a fact witness and as an expert witness, we find that the defendant doctors testified as to their own factual experiences during Mrs. Johnston's delivery. Furthermore, we believe that the question of admissibility of learned treatises may no longer be relevant; the jury found that Dr. Hewens was negligent but did not proximately cause Wesley Johnston's injuries. As to Drs. Gallant and Huttner, the jury found no negligence. In light of the extensive evidence admitted at trial as to both negligence and causation, we believe that the admission of learned treatises to impeach the medical expertise and, opinions of the defendant doctors on the question of liability would not have altered the jury verdict.

4. Dr. Clancy's Testimony

Finally, plaintiffs argue that Dr. Clancy, one of Wesley Johnston's treating physicians, should not have been allowed to testify at trial. Plaintiffs maintain that Dr. Clancy should not have

been permitted to give opinions on the cause of Wesley Johnston's injuries. Plaintiffs contend that Dr. Clancy did not record an opinion about the cause of Wesley Johnston's injury in the hospital records and, therefore, he should not have been permitted to testify about causation. Plaintiffs contend that defendants attorneys contacted Dr. Clancy, ex parte, without written authorization by plaintiffs. Furthermore, plaintiffs accuse Dr. Clancy of changing his mind prior to trial after speaking with the defense attorneys and claim that Dr. Clancy initially told plaintiffs that he did not have an opinion as to the cause of Wesley Johnston's injuries.

Defendants deny plaintiffs' contention that Dr. Clancy changed his mind prior to trial. Moreover, defendants argue that during pre-trial discussions with Magistrate Judge Wolfson, defense attorneys Mr. Socey and Mr. Pomeroy informed plaintiffs' attorneys that they intended to call treating physicians at trial, particularly Dr. Clancy. Finally, defendants argue that Dr. Clancy had to develop an opinion on the cause of Wesley Johnston's injuries during the course of treatment in order to properly treat him.

The first question is whether allowing testimony by a treating physician, Dr. Clancy., violated Wesley Johnston's physician-patient evidentiary privilege. The law is clear that a patient who initiates a personal injury suit waives the privilege regarding information that is relevant and material to the patient's physical condition. MCCORMICK ON EVIDENCE, 4th Ed., Vol. 1, p. 384-387 (1992); Stigliano v. Connaught Laboratories, 140 N.J. 305 (1995); Moses v. McWilliams, 379 Pa. Super. 150 (1988). The policy behind the physician-patient privilege is to promote the free exchange of information between a patient and a treating doctor. However, where a patient places his physical condition directly at issue in litigation, the benefit of the privilege is lost. To permit the privilege to survive in this situation would allow a patient to use the privilege as both a "shield" and a "sword." MCCORMICK ON EVIDENCE at 385.

In this case, plaintiff Wesley Johnston waived his physician-patient privilege by initiating this lawsuit. In placing his physical condition directly at issue, Wesley Johnston opened the door for the defendants' attorneys to elicit testimony from treating physi-

cians as to the treatment, diagnosis and cause of Wesley Johnston's injuries. Stigliano at 312 (allowing testimony as to causation because "causation is an essential part of diagnosis and treatment").

The second issue is whether a treating physician may be contacted on an ex parte basis by defense counsel. The New Jersey Supreme Court has held that ex parte communications are permissible provided that certain procedures are followed prior to ex parte discussions. Stempler v. Speidell, 100 N.J, 368 (1985).[3] In Stempler, the New Jersey Supreme Court held that the defendant should notify the plaintiff of the time and place of ex parte interviews, inform the doctor of the scope of the discussions and instruct the doctor that participation is entirely voluntary. N.J.S.A.2A:84A-22.1 to 2A:84A-22.7. The policy behind the New Jersey rule is that waiver of the physician-patient privilege extends only to relevant medical information and that this limitation may be ignored in ex parte interviews if certain procedures are not followed.

In this case, defendants' attorneys did not expressly follow the Stempler procedures for initiating and conducting ex parte interviews with the treating physicians. Rather, during the pretrial conference with Judge Wolfson, defense attorneys Pomeroy and Socey indicated that they intended to call "treating physicians" at trial. The plaintiffs' attorneys did not object and Judge Wolfson permitted "treating physicians" to be listed as potential defense witnesses. Prior to trial, defendants indicated that they planned to call Dr. Clancy as a witness. Although Dr. Clancy advised plaintiffts that they could depose him, they declined to do so. Therefore, plaintiffs were given sufficient notice that the defense intended to call Dr. Clancy at trial. Under these circumstances, we find that the defense attorneys adequately notified plaintiffs of their intended communications with Dr. Clancy.

III. CONCLUSION

For the foregoing reasons, the Court will deny plaintiffs' motion for a new trial. An appropriate Order will be entered.

Dated: 2-3-97

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3. As New Jersey is the location of the critical events in this personal injury case and the forum of the litigation, we apply New Jersey law.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5102

WESLEY JOHNSTON, a Minor by his parents and natural guardians, Domenica Johnston and William Johnston; DOMENICA JOHNSTON; WILLIAM JOHNSTON,

Appellants

v.

JENNIFER GALLANT, M.D.; JEREMY HEWENS, M.D.; DELAWARE VALLEY FAMILY HEALTH CENTER; RUBY P. HUTTNER, M.D.; RUTH MC GEE, R.N.; HUNTERDON MEDICAL CENTER

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 93-03281)
District Judge: Honorable Anne E. Thompson

Submitted under Third Circuit LAR 34.1(a)
October 24, 1997

BEFORE: MANSMANN, GREENBERG, and ALARCON*, Circuit Judges

(Filed: Oct 8, 1997)

MEMORANDUM OPINION OF THE COURT

GREENBERG, Circuit Judge.

*Honorable Arthur L. Alarcon, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Wesley Johnston, a minor by his Parents and Natural Guardians, Domenica Johnston and William Johnston, and Domenica Johnston and William Johnston on their own behalf, appeal from an order entered on February 5, 1997, denying their motion for a new trial. Judge Thompson denied the motion in an opinion in which she held that: (1) the verdict was not against the weight of the evidence on either causation or negligence; and (2) the court did not err in: (a) permitting the jurors to ask questions during the trial; (b) admitting evidence that Hunterdon Medical Center received accreditation by the Joint Commission on the Accreditation of Hospitals; (c) limiting cross-examination of defendant doctors with medical tests; or (d) allowing the testimony of a treating physician.

In reviewing this matter we recognize that in this hard-fought jury trial the appellants might well have obtained a liability verdict in their favor. Nevertheless, we cannot say that the district court abused its discretion in denying a new trial. See Link v. Mercedes-Benz of N. Am. Inc. 788 F.2d 918, 921-22 (3d Cir. 1986) Judge Thompson convincingly explained the reasons for denying the new trial and we find no fault in that denial.

We do comment, however, on one point. In this case the court without objection of the parties permitted the jurors to submit questions. Insofar as we are aware, we never have approved or disapproved this procedure and we do not address this fundamental point in this opinion. Rather, because the parties did not object to the procedure, appellants may contend only that the court abused its discretion in how the questioning was permitted. We simply do not see any abuse of discretion as the court must be able to control how the trial is conducted. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 609 (3d Cir. 1995).

In view of the aforesaid, we will affirm the order of February 5, 1997.

TO THE CLERK:

Please file the foregoing memorandum opinion.

xxxxxx

Circuit Judge

DATED:

93-3221

Juror #1

I am confused about the parties in the defense.

Each physician is represented as well as the hospital

Delaware Valley Family Health Center is not.

I assume the physicians are employees of D.V.F.H.C. (either a group practice or H.M.O. domiciled outside N.J.

Please Clarify

Juror #7

FILED
OCT 2 1996
AT
WILLIAM T. WALSH
CLERK

1
Ques #2

73-3261

Can I have a clearer explanation of OA and I & E / BOA positions?

OCT 3 1996
AT 8:30
WILLIAM T. WALSH
CLERK

What do these acronyms mean? How do they relate to labor?

10½ Quiz # 3 [illegible] 3281

WHAT ARE SOME OF THE KNOWN CAUSES OF CEREBAL PALSY ? I DONT BELIEVE THIS HAS BEEN MENTIONED

FILED
OCT 6 1996
AT 8:00

10/4 Quiz #4 9B-3381
UR

Is Chestnut Hospital accredited by JCAH?

~~Does anything in any Degree of Supervision or Records, any Supervision?~~

~~Jan~~ Fri 11 (E.)

OCT 1996

Are there any obstetricians employed by Delaware Valley Clinic?

Is there a policy for C-section or Co-section determination.

And Dr Galant report check of Dr Hewings + whose documentation??

Is there a policy on responsibility of residents?

~~Is~~ attending obligated to follow or agree + decision of consultant?

How long is a neonate discharge? (endangerment)

Is there a standard of care for these Deaths. By JCAH?

CV 93-3361

Juror # 6

Question # 5

1) Please refresh if Mrs. Johnston was given a referral to Delaware Valley Center - or did she find them herself?

Please go over -

2.) What if any other tests were done prenatally either by Dr "Gallant" or Dr. Heeyms? - to determine any possible problems or defects

3.) Will we hear Mr + mrs Johnston family medical history?

FILED

OCT 15 1996

CV93-3281

question #6

Given the argument by the plaintiff for CPD (sp? cefalopelvic disproportion), can the size of the baby's head and the size of the pelvis be measured to conclusively prove CPD? If yes, was that done of Mia + Wesley + what was the result? If not, why weren't the measurements done?

FILED

OCT 15 1996

93-338

Juelle #7 Have Dr. Gallant, Dr. Hewens or Dr. Hutnick been involved in a delivery which involved CPD (i.e. what part experience, if any, do they have w/CPD- they seem first hand CPD)?

If they have experience, what comparisons to the delivery of Wesley can be drawn?

Did Dr. Clancy ever see a baby ~~affected~~ by CPD?

RECD
OCT 16 1996
AT
FILED
OCT 16 1996
AT 8:30 M
WILLIAM T. WALSH
CLERK

CV 93-3281

ques #8

If a mothers heart rate goes up with activity or stress will a fetus' heart rate go up also in relationship to the mothers.

What are the possible effects of annual episodes of prolonged bradycardia?

What is the earliest stage station you can see the baby's scalp?

How quickly can the pH or O_2 level or Bicarb level change?

Was Mrs Johnston given any medication besides oxygen during labor?

RECEIVED
OCT 1 - 1996

Ques 9 CU 93 2381

HOW SERIOUS AND WHAT TYPE IF ANY DAMAGE CAN BE DONE BY 3 EPISODES OF A LOWER HEART RATE (AS 90 TO 95 BPM) FOR PERIODS OF 2 TO 4 MINUTES CONTINUOUS. ARE DECELERATIONS OF THIS NATURE, REALLY CONSIDERED UNALARMING. OTHER THAN EMBILICAL CORD CONSIDERATIONS AND CONTRACTIONS, WHAT ARE CAUSES OF THESE DECELERATIONS

REC'D
OCT 1 - 1986

Jill #10 CU 93-2081

What does it mean if the baby is lodged in the birth canal when a C-Section is being done? Is this a truly negative condition for the baby to be in? In terms of Baby Wesley, what are the implications?

RECD
OCT 1 - 1996

Ques # 11 CV 98-3281

Question: If the baby had a stroke intra-uterine, would there be any indication of this on the fetal heart monitor strip? If so what would it be?

Question: Could an emboli have originated in the umbilical cord?

RECD
OCT 1 8 1996

Ques #12 CO 93-3287

Can bradycardia affect cerebral circulation

REC'D
OCT 16 1996

Guilt #13 CU 93-3281

Given what [redacted] Dr. Morgan knows about Mia's delivery, if he were present, would he have done anything differently?

OCT 1 1996

well #14

Can you have a normal heart rate and be acidotic?

Is it possible to have a normal heart rate immediately after a stroke?

If a mother is receiving oxygen during labor, delivery, or a C-section would the fetus benefit from it also?

OCT 1 1996

CV-93-3281(AK

Q111
#15

HOW IS SOME PROGRESS DEFINED.
OF WHAT QUANTITY, IS THAT
DEFINED BY P

OCT 17 1996

CV-93-3281(AET)

Q#11 16

CAN NORMAL PH LEVELS STILL BE MAINTAINED IF ASPHYXIA OCCURRED

OCT 1 1996

Ques #7 How do you determine an attempt of vacuum extraction?

I ~~know~~ know that 3 different attempt were made, but how many times was the baby actually pulled → just 1 time each — or several?

OCT 1 1996

full #18

Does the hospital have a policy on routine blood tests be new or cord blood?

During a contraction can a baby be palpated at one station and then during a relaxed phase return as a previous station?

If oxygenation is increased, will it increase or decrease the ph level?

OCT 1 1996

Question # 19

CV-93-3281 (AE)

10/18

CV 93-
3281

WHAT CAUSES THE LACK OF FILLING OF THE BRANCHES OF THE ANTERIOR SERVAL ARTERY, AND OR THE MIDDLE SERVAL ARTERIES, IS IT POSSIBLE TO OCCLUDE BLOOD FLOW TO THE MIDDLE SERVAL ARTERIES IN THE BRAIN BY APPLYING ENOUGH PRESSURE TO SCALP OR SKULL? IS IT POSSIBLE FOR ENCEPHALO-DISPROPORTION TO HAVE CAUSED THESE OCCLUSIONS?

OCT 1 - 1996

10/18 question # 20

OUC3-325

Do it takes to pick up a stroke on CT scan or by MRI after it is a little bit older or is it takes to pick up on the next

(what type of stroke would one have (H.E.) if hepatic encephalopathy was involved?

Does the middle cerebral artery supply the brain stem also?

Was Wesley on any anticoagulation therapy after the stroke?

OCT 1 - 1996

10/18 Question #21 CV 93 3761

A few times, a mention was made of membranes rupturing during the delivery.

① What does this mean - what membranes ruptured?
② Is this a bad thing or an ie it somewhat common?
③ What are the implications/areas of Mia's labor and Wesley's well being?

OCT 1 - 1996

juror #24 Cv 93-387

CAN WE GET THE TESTIMONY OF MRS JOHNSON WHILE SHE WAS BEING DIRECTED BY MS RHODES AT THE OPENING OF THE TRIAL

OCT 2 1996

US# 25 FB-33 281 "

1.) We are missing OCT 2 thru
(FHR) strip between
8:10 Am - 9:20 - we wld
like to see these - either
the actual or the exp
blages exhibit.

FILED
OCT 25 1995
3:30
WILLIAM T. WALSH
CLERK

Cr 43358[illegible]

Judge Thompson, RECD OCT 2

The jury would like to hear Dr. O'Leary's testimony relating to sequence of events in Mrs. Johnston pregnancy from the time of her initiation of labor to the time of her delivery and his opinions at each phase.

We would also like to hear the cross-examination of this witness.

Ctr 9 93-3081
Cause # 27
Judge Thompson
RECD
OCT 2 1996
The Jury has reached
a Verdict

No. 97-1250

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WESLEY JOHNSTON, a Minor by his Parents and Natural Guardians, Domenica Johnston and William Johnston and DOMENICA JOHNSTON and WILLIAM JOHNSTON, on their own behalf,

Petitioners,

vs.

JENNIFER GALLANT, M.D., JEREMY HEWENS, M.D., DELAWARE VALLEY FAMILY HEALTH CENTER, RUBY P. HUTTNER, M.D. and HUNTERDON MEDICAL CENTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS JEREMY HEWENS, M.D. AND DELAWARE VALLEY FAMILY HEALTH CENTER

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STATEMENT PURSUANT TO RULE 29.6

The parent company for Respondent Delaware Valley Family Health Center is Hunterdon Medical Center. Delaware Valley Family Health Center has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

A. The complete lack of credible evidence connecting petitioners' injury with purported negligence by respondents. 2

Reasons for Denying the Writ 6

Conclusion 13

TABLE OF CITATIONS

Cases Cited:

DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512 (4th Cir. 1985) 8, 10

United States v. Ajmal, 67 F.3d 12 (2nd Cir. 1995) .. 8, 10, 11

United States v. Bush, 47 F.3d 511 (2nd Cir. 1995) .. 10

United States v. Callahan, 588 F.2d 1078 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979) 8, 9

Contents

	Page
United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993)	10
United States v. Douglas, 81 F.3d 324 (2nd Cir. 1996), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 202, 116 S. Ct. 2514 (1996)	8
United States v. Lewin, 900 F.2d 145 (8th Cir. 1990)	8, 10
United States v. Sutton, 970 F.2d 1001 (1st Cir. 1992)	8, 10
United States v. Thompson, 76 F.3d 442 (2nd Cir. 1996)	8

STATEMENT OF THE CASE[1]

In this medical malpractice action, petitioner Wesley Johnston and his parents, Domenica and William Johnston, allege the respondent health care providers are responsible for Wesley's cerebral palsy, which they claim resulted from alleged injuries to the child during labor and delivery. The jury was presented with expert medical testimony from all parties at trial which established that the infant petitioner was healthy at birth and which refuted the theories of petitioners' medical witnesses that the child's neurological injury was caused by purported asphyxiation during labor and the use of vacuum extraction to assist delivery. Accordingly, following a trial that lasted several weeks, the jurors rendered a defense verdict, finding specifically that Dr. Jeremy Hewens was negligent, but that his negligence was not a proximate cause of injury, and that the other defendants were not negligent.

Following an unsuccessful motion for a new trial, petitioners appealed to the United States Court of Appeals for the Third Circuit, claiming the verdict was against the weight of the evidence, and that purported errors by the trial court required that a new trial be granted. The Third Circuit affirmed the trial court's refusal to order a new trial, commenting specifically on petitioners' claim that the trial court erred in permitting jurors to submit questions during trial, a procedure to which petitioners made no objection until the trial was nearly over. While it declined to rule on the propriety of permitting

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1. Although the within brief is submitted on behalf of respondents Jeremy Hewens, M.D. and the Delaware Valley Family Health Center, we have been advised by counsel for respondents Huttner, Gallant and Hunterdon Medical Center, that the positions of those respondents regarding certiorari are identical to the stance of Dr. Hewens expressed herein, and that they will rely upon this submission as their statement in opposition to the petition.

jurors to submit questions, the Third Circuit made clear that the manner in which the questioning was permitted could not amount to an abuse of discretion by the trial court because "the court must be able to control how the trial is conducted" (A-15).

Petitioners now urge this Court to review their case, presenting the following question for review: "Did the trial court err in permitting the jury to pose questions on complex medical topics to physician fact- and expert-witnesses?" (Petition for Writ of Certiorari, page i). However, in expounding on the issue before this Court, petitioners make clear that they "do not presently challenge the trial court's discretion in **permitting** juror questions in general" but contend only that "the **invitation** to formulate such questions" and "the **manner** in which the questions were put" was prejudicial to their case (Petition, pages 10-11). Thus, even if there was any merit to petitioners' completely unsupported contention that the result at trial would have been in their favor but for purported procedural errors, the precise issue petitioners wish this Court to review is unclear. Moreover, the factual context in which petitioners have presented their question for review is so inaccurate that it seems designed to purposely mislead this Court. There was absolutely not a single instance during trial where the court permitted the jurors to "pose questions" to any witness on any topic. In short, petitioners present no basis which warrants granting their Petition for a Writ of Certiorari.

A. The complete lack of credible evidence connecting petitioners' injury with purported negligence by respondents.

At its crux, the trial of this action was concerned with determining the cause of the tragic circumstance out of which the litigation arose: the development of permanent brain damage

by a newborn infant which would forever alter the life of that child and his family. The importance of determining who, if anyone, was responsible for the infant petitioner's condition, and the highly technical theories of causation propounded by each of the multiple parties to the litigation, necessitated the presentation of complex medical evidence by numerous expert witnesses at trial. The totality of that evidence provided ample basis for the jury to conclude, as it did, that petitioners failed to prove the child's condition was caused by a deviation from accepted standards of medical care by any respondent in this case.

Petitioners' expert medical witnesses, Dr. Gilberto R. Pereira, a neonatologist, and Dr. Ronald J. Jacobson, a pediatric neurologist, both opined that events during his mother's labor caused the infant petitioner's condition (85, 156).[2] Dr. Pereira presented his theory quite specifically, claiming that the child's condition was the result of a combination of two factors, the purported "lack of oxygen getting to the fetus," or asphyxia (85) during labor, and the application of suction by a vacuum extraction device which was used in a final attempt to deliver the child vaginally before a surgical delivery was performed (85). According to Dr. Pereira, the purported asphyxia caused a build-up of acid in the blood vessels of the child's brain, allegedly damaging the inner surface of the vessels, which were then purportedly "stretched" and further damaged by the suction of the vacuum extraction (85). Dr. Pereira testified that these factors, in combination, allegedly led to the formation of blood clots that occluded the child's middle cerebral artery, causing the brain damage at issue (84, 85, 87).

On cross-examination, however, the basis for the theories of both Drs. Pereira and Jacobson were revealed to be flawed.

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2. Numbers in parentheses refer to pages of Petitioners' Appendix submitted in their appeal to the United States Court of Appeals for the Third Circuit.

The doctors admitted that the absence of meconium (a sign of fetal distress) prior to birth, as well as the infant petitioner's completely normal presentation at birth (with strong Apgar scores and a vigorously beating heart) were highly unusual findings in a child who had purportedly been asphyxiated (109-10, 186-87). Dr. Pereira further admitted that the child's blood Ph, which was the factor he most vehemently cited in support of his opinion that asphyxiation and the resulting acid build-up had occurred, did not support a diagnosis of asphyxiation by the standards of the American Academy of Pediatrics (113-15). In addition, both doctors were forced to admit that the causation scenario they propounded was merely theoretical, that events such as this often occur without asphyxia (130, 174-75), and that what caused a blood clot or other occlusion to enter the child's middle cerebral artery and block the blood flow to an area of his brain could not be definitively determined (128-29, 172).

As the trial progressed, expert witnesses presented by the respondents gave testimony that apparently convinced the jury that the asphyxiation/vacuum extraction combination theory propounded by petitioners was not the cause of the injury in this case. Robert A. Zimmerman, M.D., a pediatric neuroradiologist, testified that there was evidence here that emboli (blood clots or other small pieces of material) entered the infant's middle cerebral artery and blocked blood flow, causing a stroke and the resultant brain damage (299). However, Dr. Zimmerman made clear that (1) emboli of this kind typically come from the heart and are not related to asphyxia (299); (2) the emboli here could not have been caused by the vacuum extraction attempts because even if a blood clot could have developed on the surface of the child's scalp as a result of the suction application, it would not be able to travel backward, against arterial blood flow, to reach and occlude the middle cerebral artery (304); (3) in his twenty years of experience with

injuries such as that here, he has *never* known of a vacuum extraction producing this sort of injury (306); (4) the injury here was not caused by any sort of trauma to the child's head (306); and (5) the radiological studies of the infant petitioner's cerebral arteries revealed no evidence of the "irritation" which was a key component in the causation theory propounded by petitioners' experts (308).

Defense experts Mark Morgan, M.D., an obstetrician specializing in high-risk pregnancies, and obstetrician-gynecologist Anthony Quartell, M.D., also reviewed the petitioners' medical records, particularly those involving the labor and delivery at issue here. Both doctors testified unequivocally that the causation scenario proposed by petitioners' experts had no medical basis. Indeed, the doctors made clear that the blood gasses and fetal monitor recordings, as well as the child's completely healthy presentation at birth, ruled out the possibility that he had been asphyxiated or that his blood had been acidotic (681-82, 746-47, 762-64, 779-80). Drs. Morgan and Quartell also agreed that there was no causal connection between the use of the vacuum extraction device and the child's brain damage (678-81, 769-70).

In addition, Robert Clancy, M.D., the pediatric neurologist who treated the infant petitioner immediately after birth at Children's Hospital of Philadelphia, offered persuasive testimony in which he detailed the medical tests he performed which he opined conclusively ruled out both the asphyxiation and vacuum extraction components of petitioners' causation theory. Dr. Clancy testified that not only did the child not appear to have been asphyxiated, but the CAT scan performed on him showed several specific, discrete strokes which were not consistent with asphyxiation (325-27). Furthermore, Dr. Clancy made clear that he eliminated purported trauma from the vacuum extraction attempts as a possible cause of the injury based on a carotid

ultrasound, which revealed the arteries leading to the child's brain had not been stretched or damaged by the suction (328-31). Dr. Clancy concluded that the injury here was caused by emboli of unknown origin that blocked the blood flow in the child's brain, causing the strokes (331, 332-33). Here, as is usually the case, the source of the emboli was never determined (333).

In reaching a verdict finding that no actions of Dr. Hewens or any other respondent proximately caused the infant petitioner's injury, the jury clearly credited the testimony of respondents' medical expert witnesses and rejected the asphyxiation/vacuum extraction combination theory propounded by petitioners. Since the verdict was based on a reasonable interpretation of the evidence presented at trial, and petitioners cannot specifically identify any area where purported errors by the trial judge may have affected the outcome, there is absolutely no basis for further appellate review by this Court.

REASONS FOR DENYING THE WRIT

Petitioners' factbound claim that the trial court abused its discretion by allowing jurors to submit questions during trial does not warrant review by this Court. As will be demonstrated herein, there is absolutely no compelling reason why the petition for a writ of certiorari should be granted, nor have petitioners made any arguments which indicate a basis for this Court's review. Indeed, the petition is nothing more than a last-ditch effort to obtain a new trial of an action that was fairly tried to a conclusion petitioners found disappointing, but which was supported by a plethora of evidence.

The sole issue before this Court concerns the propriety of juror questioning in this complex medical malpractice case. Although petitioners describe the purported error of the trial

court as "permitting the jury to pose questions on complex medical topics to physician fact- and expert-witnesses" (Petition, page i), their description is completely inaccurate.

At the beginning of the trial, the judge suggested to counsel that it might be helpful to permit jurors to submit questions as they arose in this very complex case. Counsel, including counsel for petitioners, agreed without objection and the trial judge thus instituted a carefully-controlled procedure by which jurors would submit *written* questions. Every time a question was submitted, the judge and counsel would evaluate the question outside of the presence of the jury before the question was asked of any witness. Indeed, no question was asked of *any* witness in the instant matter that was not previously scrutinized by the court and all counsel, with counsel being given the opportunity to raise any discussion and/or objection with the court in advance of the question being posed to a witness. The record in this case reveals that counsel for petitioners took advantage of this procedure and in certain instances objected to various questions posed during the defense case. When appropriate, petitioners' counsel also submitted jury questions to petitioners' witnesses during the petitioners' case. Thus, all counsel was given the opportunity to object to specific juror questions outside the presence of the jury, obviating any worries that an objection to a juror question would "place plaintiff's counsel in the appearance of an adversarial stance with the jury for objecting to the question" (Petition, p. 13), as petitioners now claim. Moreover, despite ample opportunity to object to the procedure as a whole (or to any part of it), counsel for petitioners never objected until nearly the very end of trial (712).

Several of the circuits have considered claims that permitting jury questions at trial constituted an abuse of discretion, requiring a new trial. These arguments have mostly arisen in criminal cases, and the procedures objected to often varied from those

employed here. There is not, nor have petitioners alleged, a conflict between circuits regarding this issue; in general, the courts have held that the decision to allow juror questioning is one for the discretion of the trial court to be determined based on the specific circumstances of each case. *See United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *United States v. Thompson*, 76 F.3d 442, 448 (2nd Cir. 1996); *United States v. Ajmal*, 67 F.3d 12, 14 (2nd Cir. 1995); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 515 (4th Cir. 1985); *United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979); *United States v. Lewin*, 900 F.2d 145, 147 (8th Cir. 1990).

While the courts have noted that allowing juror-generated questioning should be the exception, rather than the norm, several courts have acknowledged that there are some circumstances where permitting juror questions will further the "truth-seeking attributes of the jury system." *United States v. Sutton*, *supra*, 970 F.2d at 1005. The court in that case noted that juror questioning "may occasionally be advantageous, especially in complex cases and under carefully controlled conditions." *United States v. Sutton*, *supra*, 970 F.2d at 1005. According to the *Sutton* court, juror questions can be particularly helpful "by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration." 970 F.2d at 1005, n.3. In *United States v. Douglas*, 81 F.3d 324, 326 (2nd Cir. 1996), *cert. denied*, __ U.S. __, 135 L. Ed. 2d 202, 116 S. Ct. 2514 (1996), the Court noted that questions by jurors may be helpful where, for example, "a juror might not have heard all of a witness' answer or might reasonably need an explanation of some term the witness used." Similarly, the court in *United States v. Callahan*, *supra*, observed:

> If a juror is unclear as to a point in the proof, it makes good common sense to allow a question to

> be asked about it. If nothing else, the question should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop truth. It may sometimes be that counsel are so familiar with a case that they fail to see problems that would naturally bother a juror who is presented with the facts for the first time.

588 F.2d at 1086. This was undoubtedly the basis of the trial court's decision to permit jurors to submit questions in this case:

> THE COURT: Let me say this to all counsel. You can take these questions, and when you give your summations, you can address yourselves to these questions in your summations based on the evidence as you know it to have been presented. Sometimes we get a question from a juror because one juror hasn't kept up perhaps or has missed a point that another juror would have caught; and so when they are all together, they will answer each others questions. So we don't really have to answer every single one of these questions. But if it really just shows somebody missed something and it is not harmful just to let the witness answer it, I like to do it. That's my rationale for doing it.
>
> I certainly don't want to prejudice anybody or cause anybody some surprise by providing an opportunity for a witness to address something that is a surprise to somebody. But you can use these, you, yourselves, when you give your summations, and you know what the record is and you know what the answers to these questions would be from the record if you consider them to be worthwhile. Sometimes they are just repetitious. (720).

The courts have recommended that in those instances where juror questioning is deemed appropriate, the trial judge institute certain safeguards to eliminate the potential for prejudice to any party. *United States v. Cassiere*, 4 F.3d 1006, 1018 (1st Cir. 1993); *United States v. Sutton*, *supra*, 970 F.2d at 1005-06; *United States v. Bush*, 47 F.3d 511, 516 (2nd Cir. 1995); *United States v. Lewin*, *supra*, 900 F.2d at 148. The safeguards recommended are essentially identical to the procedure followed here — the jurors should submit their questions in writing to the court and the questions should be reviewed by the court with counsel, out of the presence of the jury, to permit free objection without the risk of antagonizing a juror.

Moreover, where, as here, counsel did not timely object to the decision of the trial judge to allow juror questioning, the courts of appeals have refused to reverse on that basis even in criminal cases where the liberty of the defendant was at stake (*see United States v. Cassiere*, *supra*; *United States v. Sutton*, *supra*) and in cases involving circumstances with considerably greater potential for prejudice than those alleged here. *See United States v. Bush*, *supra* (written questioning by jurors was permitted to metamorphose into direct dialogue between jurors and criminal defendant); *DeBenedetto v. Goodyear Tire & Rubber Co.*, *supra* (jurors permitted to ask 95 questions orally to trial judge, who directed witnesses to answer if he believed question was relevant).

Indeed, the only case we have found where juror questioning was the basis for an appellate court finding that a new trial was warranted was *United States v. Ajmal*, *supra*. In that case, the trial court, *over objection* by the criminal defendant's counsel, invited jurors to submit written questions at the close of the testimony of each witness, including the defendant himself. The Second Circuit's decision was based in large part on its determination that the "banal drug conspiracy"

did not involve "factual intricacies" sufficient to warrant juror questioning at all. 67 F.3d at 14.

In the instant case, there existed a sufficiently compelling basis for the trial court's decision that jurors would be permitted to submit written questions which could be asked of witnesses if all counsel approved. This was a medical malpractice case involving multiple defendants which necessarily involved a variety of theories of liability. The trial judge correctly anticipated that the trial would be lengthy and that a great deal of highly technical medical evidence would be presented to the jurors. In addition, the court apparently recognized the dramatic impact the events at issue had and the outcome of the trial would have on all its participants, and wished to ensure this important matter was given the careful consideration it deserved by a jury which had a full understanding of the evidence presented. Thus, the court indicated juror questions would be accepted in the above-described carefully-controlled manner, and no counsel objected.

Petitioners' objections now simply have no merit. Petitioners' primary contention is that the 55 juror questions that were submitted in writing were mostly irrelevant. In fact, some of these questions, listed verbatim in the petition, were never put to a witness. Most of the questions that were asked at the behest of a juror concerned areas that had already been addressed and, as detailed above, all counsel had the opportunity to object to any question outside the presence of the jury before it was asked. In every instance, even if the question was asked of a defense witness (leading to a purported "pro-defense spin" [petition, page 13]), petitioners' counsel had available the opportunity to cross-examine the witness regarding that area, and/or recall their own witnesses for rebuttal, if counsel believed rebuttal was necessary. Petitioners' counsel never requested rebuttal, but now complains that the juror questions

asked of defense witnesses (to which petitioners' counsel never objected) left petitioners "without the ability . . . to challenge them based on expert testimony of their own" (petition, page 13).

It is most telling that, after failing to object to the trial court's allowance of juror questions until the end of trial (when petitioners' counsel suddenly decided the practice was prejudicial to petitioners), and after moving for a new trial and pursuing an appeal to the Third Circuit based in large part on this issue, in their petition for a writ of certiorari petitioners are still unable to cite any single specific instance in which they contend that a carefully-screened juror question which their counsel had approved damaged their case so significantly that, had it not been asked, the verdict would have been different. This is because no such prejudice to their case by juror questions occurred. In this case, the jury simply determined (with ample basis) that the evidence presented by one party was more persuasive than the evidence presented by that party's opponent. Petitioners' dissatisfaction, standing alone (as it does), is not a reason sufficiently compelling to warrant this Court's review.

CONCLUSION

For all the reasons stated herein, the petition should be denied.

Respectfully submitted,

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